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Beck, James Montgomery

The revolt against prohibition

New York

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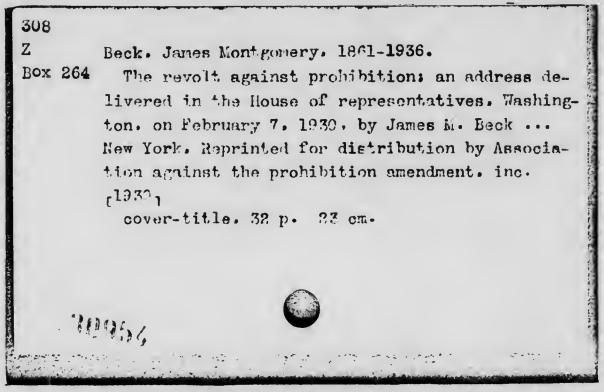
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THE REVOLT AGAINST PROHIBITION

An address, delivered in the House of Representatives, Washington

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Box 264

on February 7, 1930

by

JAMES M. BECK

Member of Congress from First Pennsylvania District
Former United States Solicitor General

"Republics abound in civilians who believe that the laws make the city; that grave modifications of the policy and modes of living may be voted in or out, and that any measure, though it were absurd, may be imposed on a people, if only you can get sufficient votes to make it a law. But the wise know that the foolish legislation is a rope of sand, which perishes in the twisting; that the state must follow, and not lead, the character and progress of the citizen."—*Emerson.*

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Association Against the Prohibition Amendment, Inc.
21 East Fortieth Street, New York City

March 27, 1930 DA/nc

The Revolt Against Prohibition

An address in the House of Representatives on February 7, 1930 by James M. Beck, Representative from Pennsylvania.

Mr. Speaker and my Fellow-Members:

As it will not be easy for me to compress my credo on the subject of prohibition within the limits of the time alloted to me, I must ask my brethren of the House not to interrupt me with questions until I have finished. If time then remains, or if the House is pleased to extend the time for the purpose, I am quite willing to submit myself to the flight of Parthian arrows, which many of my esteemed colleagues may wish to aim at me, for I am quite aware that the views that I am about to express are not shared by a majority of this House. Fortunately, this is a free forum and no parliamentary body in the world is more tolerant in listening to any views that any member may wish to express than the House of Representatives. Therefore, it is not necessary for me to say, as Brutus:

> "Hear me for my cause, and be silent, that you may hear; believe me for mine honor, and have respect to mine honor, that you may believe; censure me in your wisdom and awake your senses, that you may the better judge."

I ask the indulgent attention of the House to a brief and inadequate discussion of one phase of the preliminary report of the Law Enforcement Commission. While I may have occasion, in the

course of my address, to make some references to the interesting and eloquent address, which our distinguished colleague from New Jersey (Mr. Fort) delivered last Friday, yet I have no present intention to make a full reply to his argument. I leave that to abler colleagues, but cannot refrain, in passing, from expressing my admiration for a speech which has justly made a deep impression, due largely, I think, to its admirable diction, its faultless delivery and the transparent sincerity and courage of the speaker.

I may further say, in passing, that, notwithstanding his brilliant argument, I am not convinced that the cause of temperance would be promoted by making every householder a vintner and every cellar a brewery. I believe that the greatest evil of our age is the slow destruction of the home. I am not impressed that either its dignity or welfare as the greatest asset of civilization is promoted by the manufacture of intoxicating liquors within the home.

Nor is it my intention to discuss the entire so-called "Wickersham Report," nor even the remedial provisions which this report recommends. As to the latter, my course is easily charted. The Eighteenth Amendment is undoubtedly the law of the land. It is the duty of the President to execute it. His great mandate under the Constitution is to see that the laws are "faithfully executed." It is ours to determine what laws shall be enacted. He has taken an oath and can say with a famous litigant in a celebrated case:

"An oath, an oath, I have an oath in heaven:
Shall I lay perjury upon my soul?
No, not for Venice."

I am, therefore, prepared to vote for any reasonable enforcing measure, which the President may ask, provided always that it is not inconsistent with the Constitution. On some future occasion I may discuss the question whether one recommendation of the President's Commission does not, in substance, deprive the American people of the most ancient right of the English-speaking race, namely, trial by jury.

I restrict my discussion this morning, however, to the opening paragraphs of the preliminary report, which are well titled, "Scope and Size of the Problem." I do so because this portion goes to the very fundamentals of the great controversy. Unfortunately, it is expressed in somewhat cryptic phrases, as though the learned Commissioners were consciously walking on very thin ice. I doubt whether the American people have yet fully realized the significance and prophetic character of the inevitable implications of this portion of the report.

I confess to some curiosity as to its author. I suspect that its draftsman was Professor Roscoe Pound, than whom there is no abler student of the philosophy of law. When I read his writings, I recall the lament of Palmerston, who once wished that he was as certain of any one thing as Lord Macaulay was of everything.

Whoever be the author, this is the significant prelude to the Preliminary Report, to which I invite your close attention and upon which it is my purpose to make some comments:

> "It is impossible wholly to set off observance of the prohibition act from the large question of the views and habits of the American people with respect to private judgment as to statutes and regulations affecting their conduct. To reach conclusions of any value, we must go into deep questions of public opinion and the criminal law. We must look into the several factors in the attitude of the people, both generally and in particular localities, toward laws in general and toward specific regulations. We must note the attitude of the pioneer toward such things. We must bear in mind the Puritan's objection to administration; the Whig tradition of a 'right of revolution'; the conception of natural rights, classical in our polity; the democratic tradition of individual participation in sovereignty; the attitude of the business world toward local regulation of enterprise; the clash of organized interests and opinions in a diversified community; and the divergencies of attitude in different sections of the country and as between different groups in the same locality. We must not forget the many historical examples of large-scale

> public disregard of laws in our past. To give proper weight to these things, in connection with the social and economic effects of the prohibition law, is not a matter of a few months."

To many this preliminary explanation of the Commission may be as enigmatic as the Delphic oracle, but if the prohibition leaders had caught its full significance, they would have rent their garments, sat themselves down in sackcloth and ashes, or possibly have had resort to the wine which on high scriptural authority "maketh glad the heart of man." The obvious meaning of this cryptic deliverance of the President's Commission is that the collective experience of the past and the time-honored traditions of the English-speaking people constitute a damning indictment of the Eighteenth Amendment. It is a pity that the Commission did not say so in words that "he who runs may read," for it would have cleared the present foggy atmosphere. While it should not require "a few months" for the learned members of the Law Enforcement Commission to convert their plain implications into positive statements, yet it should be a matter of gratification to the wets and of apprehension to the drys that this commission, composed of able and learned men, will at some appropriate time pass from the mere incidentals of the great controversy and discuss the very heart of the problem. They have by fair

implication made a solemn promise to do so and they will not break faith with the people.

The fanatical dry leaders are at the moment enjoying a Belshazzer's feast, as they view the fat and juicy majorities which they have in this Congress and in other legislative bodies. But upon the wall now appear the words, *"Mene, Mene, Tekel, Upharsin"*—for the sentences that I have quoted, when translated into common speech, mean that the prohibition amendment has been "weighed in the balances and found wanting."

I do not profess to be a Daniel, although at the moment, surrounded by a largely preponderating majority of the drys, I may be in a "lion's den," but I shall venture to explain the real significance of these pointed allusions to the ancient traditions and experiences of the English-speaking race and their application to the present situation.

The profoundest intellect of antiquity, Aristotle, said two thousand years ago that, if a constitution—by which he meant the aggregate of the laws prescribed by the State—conflict with what he called the "ethos," namely, the spirit or genius of a people, the result of the conflict would not be uncertain, for the laws have no lasting vitality save in the spirit of a people. We must distinguish this "ethos," or spirit, of a people from the mere results of the polling booth, or fluctuating votes in legislative assemblies, for these only register the temporary opinions of fleeting majorities, and at times even minorities, while the "ethos" of the people is a quality born with the individual

and persisting unto his death. "The shallow murmur but the deep are dumb."

If this be true, then it is especially true of a race of individualists, who have never been disposed to place upon the brow of King Demos a crown, which they had taken from autocratic kings. Hence, the significance of the phrase in the report, "We must note the attitude of the pioneer toward such things." We are still a race of pioneers. It is true that we have cleared a continent of its once virgin forests, but the American people did something far greater than that. They cleared the mind of America from the obsession of past ages that a State had an unlimited and divine power to regulate, in all respects, the conduct of the individual. A race of individualists does not deify the State. It refuses to believe that the oil of annointing, that was once supposed to sanctify the head of the monarch and clothe his utterances and acts with infallibility, has now fallen upon the multitudinous tongue of the majority. The individualist at all times, and never more than in this country, has said to the State: "There is a limit to your power; thus far and no further, and here shall thy proud waves be stayed." The ten-year revolt against the oppressive regulation of private conduct prescribed in the Eighteenth Amendment is a most encouraging sign. If many Americans had not thus risen in protest, we would not be worthy descendants of a freedom-loving ancestry. It proves that, no matter how powerful the State is, and no matter

how great its appeal to the imagination, the American people have not yet lost the spirit of individualism which has made them the greatest nation in the world.

It may be, as the gentleman from New Jersey argued, that prohibition has been a great economic advantage to our industrial society, although I confess it is hard to understand, if that be so, why Germany, France and England, three of the most efficient industrial states in the world, have managed for centuries to conduct their great industrial enterprises with unexampled efficiency without denying the laboring man the right to have a glass of wine or beer. But, assuming it to be the fact that prohibition has added an infinitesimal fraction of one per cent to the industrial output of America, the American people, and especially those who labor with their hands, are not disposed to sell their ancient birthright for such a mess of pottage.

The report goes on: "We must bear in mind the Puritan's objection to administration." That suggests an historical fact of great significance. When the Pilgrims of the Mayflower set forth on their momentous journey, fleeing as they were from oppressive laws whose sanctity they refused to admit, and were by chance of wind and wave brought to the coast of Massachusetts, instead of that fair land of Pennsylvania, to which they had intended to go, and when, having seen the rock-bound coast of Massachusetts, they preferred to put out again to sea, and when, that being impossible, they decided to land, they felt it neces-

sary to enter into a compact of government, and it is interesting to note that, in that first rudimentary constitution written in the cabin of the Mayflower, these pioneers only agreed with each other to obey such "just and equal laws" as the majority might prescribe. In that lay the germ of our system of constitutional limitations upon the power of the State. Having had some experience with the abuses of legislation and believing that there was an unwritten law that prevented any State from exceeding the true province of government, they only agreed to obey "just and equal" laws.

The truth had been even more sublimely stated by Sophocles in his great tragedy of "Antigone." Antigone's brother had committed a crime against the State of Thebes and by its laws his body was denied the final dignity of burial. Nevertheless, Antigone buried her brother, in obedience to the call of affection and the dictates of humanity, and when the King, who incarnated the power of the State, demanded of her whether she had violated the laws, she nobly replied:

> "Yes, for that law was not from Zeus, nor did Justice, dweller with the gods below, establish it among men; nor deemed I that thy decree—mere mortal that thou art—could override those unwritten and unfailing mandates, which are not of today or yesterday, but ever live and no one knows their birthtide."

The preliminary report further emphasizes its meaning by a most significant analogy. It says: "The Whig tradition of a 'right of revolution'; the conception of natural rights, classical in our polity; the democratic tradition of individual participation in sovereignty." What does this allusion to the great "Whig tradition" mean? The word "Whig" first became associated with the liberal tendencies of the free yeoman of England before the revolution of 1688. James II, an arbitrary monarch, believed that it was his divine right to impose his ideas of morality upon individuals and to enforce his mandates, he sent out his Lord Chief Justice Jeffreys on what was known as the "Bloody Assizes." Within four weeks Jeffreys had tried and convicted over twelve hundred men and women, and even children. Of course, this is not a record for efficiency, as compared with our government in the matter of prohibition, for last year, according to the report of our able Attorney General, there were terminated 56,455 criminal prosecutions under the Volstead Law. Jeffreys, therefore, only converted free Englishmen into criminals at the rate of three hundred a week, whereas our benign government is indicting the American people at the rate of one thousand a week.

This significant reference to the Whig tradition may refer to the use of the name in American politics and this suggests an analogy of profound interest and significance. The Whig Party from 1830 to 1860 was a great party. It had such

leaders as Henry Clay and Daniel Webster. Its weakness was its disposition to adjust questions of profound morality in the spirit of compromise and surrender. Clay was the "Great Compromiser" of American politics. Webster yielded to the spirit when, eighty years ago next March, he arose in the Senate and, in the interests of the Union, which he loved so truly, advocated a drastic extension of the Fugitive Slave Law. It must be remembered that the Fugitive Slave Law was also a part of the Constitution, but the attempt to make the people of the North involuntary slave-catchers provoked such an intense moral revolt that Webster did not avert the Civil War by his speech of March Seventh, but simply destroyed himself in his honest attempt to save the Union by making the Fugitive Slave section of the Constitution more obligatory.

The result is a sinister omen for the Republican Party even in this day of its great power. The Whig Party perished and the Republican Party came into being. Our history gives an earlier instance of the danger of violating this "higher law" of human freedom, even though its pretended justification is the maintenance of the Constitution. The Federalist Party believed that Jefferson and his party were attempting to destroy the Constitution and in its defense passed the alien and sedition laws. These oppressive laws destroyed the Federalist Party. The Republican Party may well profit by these two great lessons. I say it with regret, but I say it as a necessary

warning, that the Republican Party cannot longer afford to sell its soul to the fanatical Drys and if it does, and thus becomes the party of Prohibition, it may have a like fate. The party did not emancipate the slave to put the white man in the chains of an intolerant policy. The Democratic Party can retain its hold upon its rank and file by the *vis inertiæ* of invincible prejudices, but the Republican Party cannot hold forever a large number of self-respecting men and women to whom the intolerance of prohibition is a moral affront. It cannot forever be half-wet and half-dry.

And what is the meaning of this "conception of natural rights classical in our polity," to which the draftsman of the preliminary report refers? To understand it, we must go back to the epic days of our Republic. In the Colonial period, the sturdy yeoman of America believed, as all their ancestors had before them, that the State was a thing separate and apart from the people and that its authority to impose its will without restriction upon its subjects was only secondary to that of God. In the middle of the Eighteenth Century, the new conception of the sovereignty of the people and the reserved rights of the individual became the great ideal. It gave the burning significance to the great preamble of the Declaration of Independence, which has given, not only to us, but to all mankind, a definition of liberty, which "time cannot wither, nor custom stale."

Even as the pathfinders of the Mayflower limited the power of government to the imposition of "just and equal" laws, so there is in the hearts of all generations of Americans a profound instinct that, whether safeguarded by constitutional limitations or not, there is a moral limit to the power of government to regulate private conduct.

I do not construe this right of personal liberty as narrowly as did the gentleman from New Jersey last Friday. He said: "What is the American's right of personal liberty? Well, first, he may think as he pleases, and when he has done that, there is not another thing he can do as he pleases." I cannot accept such a definition of liberty. I commend to my distinguished colleague a rereading of the Bill of Rights, as set forth in the first nine amendments to the Constitution. If the utterances of the living ever reach the dead, then my colleague's definition of liberty must have made George Mason, and Thomas Jefferson and George Washington turn in their graves. Such a definition of liberty is so amazing that I prefer to think that our colleague did not mean the literal import of his words. He simply meant that there was no liberty that was absolute and in this I agree. But there are ancient liberties of a free people, protected by constitutional limitations, or by this "ethos" of the people, of which Aristotle spoke, or by ancient customs and the collective experience of free nations which, when invaded by the State, cannot find any moral justification, even in a constitutional amendment.

No one who knows me will challenge my deep

reverence for the Constitution. I have given much of the best energies of my life to its defense. If I have rendered to my day and generation any service, it has been in calling attention, by pen and words, to a noble compact of government, which, I fear, is more respected than read. But I am not prepared to say that even an amendment to the Constitution forecloses controversy upon any subject, or that it is unpatriotic to challenge its wisdom. The Constitution is a living organism and finds its strength and vitality in its adaptability to changed conditions and a wider vision.

We are constantly reminded by the fanatical drys that to question the wisdom of the Eighteenth Amendment is a challenge to the Constitution itself. I deny it. They would not think so if the conditions were reversed. Suppose—and it is a fanciful supposition—that the Eighteenth Amendment read that the manufacture and use of alcoholic beverages should be encouraged and that every citizen was commanded by its terms to drink an alcoholic beverage once a day. Would the fanatical dry, in that event, have the same feeling as to the sanctity of the Constitution and its infallible wisdom? Would they not argue, as the wets now argue, that such an amendment goes beyond the fair province of government? Would those, to whom any alcoholic beverage is distasteful, take their daily portion out of respect to the Constitution?

Certainly, the leaders of prohibition showed scant respect for the Constitution when they wrote

this illegitimate amendment into that noble instrument and thus destroyed its perfect symmetry and turned a wise compact of government into a mere police code. Certainly, they had scant respect for the Constitution when they thus destroyed its basic principle of local self government and in this matter of daily habit, relegated the sovereign States to the ignominious position of mere police provinces. The Constitution has suffered many changes, some of which have impaired its symmetry and beauty, but none that is comparable to the Eighteenth Amendment in its destructive effect upon the proud consciousness of the once sovereign States.

The preliminary report goes on to say, "We must not forget the many historical examples of large-scale public disregard of laws in our past." The report might have added, in the past of the whole human race, for the political progress of civilization has always been marked by revolts against unjust and oppressive laws and it is significant that, in the long run, the spirit of the individual has been triumphant. Two thousand years ago, the greatest Empire that the world ever knew tried for three centuries to stamp out a little group, who were proposing to the world a new religion, and it is interesting to note that the most sacred ceremonial of that religion involved the use of wine. After three centuries of the most ruthless oppression known to antiquity, the Roman Emperor Constantine not only abandoned the policy as futile, but actually raised the

Cross as the conquering symbol of the Roman Empire.

A thousand illustrations could be given from intermediate history, but a present one should suffice. Before the Great War the most powerful and ruthless despotism in Western civilization was Russia under the Czars. It attempted to stop the use of alcoholic beverages and when an even more powerful government supplanted the rule of the Czars, the attempt was continued. In the whole history of the world, there has never been anything more ruthless, despotic and cruel than the Russia of the Soviet regime. To the leaders of this organized system of cruel oppression, Marat, Danton and Robespierre were as innocent Sunday School children. No rights, in our conception of the word, are given to any Russian when he finds himself in conflict with the small coterie of murderers, who rule that vast country. And yet, neither the iron hand of the Czars, nor the ruthless power of the Soviet regime, has ever made prohibition effective, even in a country where for centuries the people have in other respects accepted despotic rule as of course. It must be said in candor that the Soviet Regime at least had the wisdom to abandon the futile attempt. Shall our nation be less wise?

It was Edmund Burke who said that he did not know how to frame an indictment against all the people, but he might have gone further and said that you cannot indict a substantial portion of the people. The fact that, after ten years of

enforcement, with the expenditure of hundreds of millions of dollars and a ghastly sacrifice of many lives, the prohibition law is still largely unenforced damns it beyond any defense, and the only remedy suggested by the gentleman from New Jersey proves its futility. The great argument for prohibition was the injury to the home from excessive drinking and our colleague well said, "There is not a man who does not know, even the moderate drinker, that his use of liquor never added anything to the happiness of his family or the comfort of his home," and yet our esteemed colleague, as a last attempt to enforce the unenforceable, would make every home a potential brewery or wine press. It is enough to say of that argument that, even if it were desirable, which, in my opinion, it is not, it can find no justification in the Volstead Law, which expressed its own intent to prevent the further "*use*" of alcoholic beverages.

The only explanation that our colleague can give for the present situation is his suggestion that "the truth is that we Americans do not obey laws when it serves our purpose not to. We hate to be told we must do anything." This is, of course, an echo of the oft-quoted statement that we are the most lawless people in the world. I deny it. On the contrary, omitting the slums of our cities and taking the nation as a whole, we are the most patiently law-abiding people in the world. I doubt whether there is a nation in Europe, outside of Russia, in which such a policy could have been

received with so much good humor, and obeyed by millions to whom it seemed a gross violation of individual liberty. Imagine the passage of such a law in France! In 1916 it was my melancholy privilege to witness the bombardment of Rheims and, in that scene of desolation and ruin, I shall never forget the sight of the vineyards of France, extending around the destroyed city and almost to the battlefront, in which the women and children worked while their fathers, husbands and brothers died in the trenches. To me the wine pressed from that vintage might be regarded as distilled in the tears of the French women and children. Who can say that France has suffered by the enjoyment for a thousand years of the delightful light wines of that country and who could say that a law, which would seek to prevent them from enjoying this fruitage of that fair garden of France, would not cause a revolution?

If a law have any reasonable justification, or is even within the reasonable province of government, then the American people are as loyal to it as any other people, but they refuse to believe that a law is either infallible or omnipotent. They know better. To the American the law is but the reasoned adjustment of human relations and its true sanction is largely in its reasonableness and not in the fiat of the State. It is ever-lastingly true that you can not make the American people respect a law in the intellectual sense unless it be worthy of respect. In this respect, at least, they have still the liberty of thought, which our colleague from

New Jersey regards as our one remaining liberty.

A law, to be enforced, must find its justification in the conscience of the American people. They know full well that they do not make the laws, except indirectly. The laws are made, under our system of representative government, by men whom the people select for this purpose, but the people know little or nothing of nine-tenths of the laws which the representatives of the people enact in their behalf. The American people themselves directly never placed the Eighteenth Amendment in the Constitution. It was "bootlegged" into the Constitution in a period of stress by a combination of misguided moral forces led by fanatics, and by selfish manufacturers, who with their own wine cellars well filled were quite content, to increase their output, to sell the liberty of the American citizen for "thirty pieces of silver." It was proposed to the people by a portion of five hundred Senators and Representatives in Congress and it was ratified by possibly five thousand votes in the legislatures of the States. The people never had an opportunity to pass upon the question, except in Ohio, where on a referendum the people rejected the Eighteenth Amendment, although it had already been ratified by the Legislature. I do not mean to intimate that a majority of the people might not favor this law. Perhaps they would. It matters not to me if they would, for the reserved rights of the individual under the higher law of human liberty are not dependent upon fleeting majorities.

An increasing number of Americans, who once advocated prohibition, no longer believe in it after the practical test of ten years. They have seen some disadvantages in the policy, which apparently escaped the attention of our esteemed colleague from New Jersey, when last Friday he entered upon his audit of the advantages and disadvantages of prohibition. I will give you one, to which he paid no attention, and that is the effect of this policy upon the moral fiber of the American people. We all remember the famous poem of another century as to what constitutes a State. It is not the form of government—it is the character of the people. When the great work of the Constitutional Convention was ended, Washington wrote to his comrade-in-arms, Lafayette, that it would last as long, and no longer, "as there was any virtue in the body of the people."

What effect, then, has prohibition had upon the American people? That it has not increased their respect for law, which is the vital spirit of any government, must be conceded, but it is of far greater consequence that prohibition has organized our country upon a vast scale of collective hypocrisy, and, like a cancer, this spirit of double-dealing is eating away the moral fiber of the American people. The more you try to enforce it, the greater the spread of hypocrisy. The proposed additions to the Volstead Law will have as little effect as putting a mustard plaster on a cancer. It will not cure the cancer—it will only intensify its activity and cause it to spread more rapidly

through the body politic. From their pioneer forefathers the American inherited a spirit of sincerity, but now we witness a general hypocrisy and double-dealing, which is fast destroying the character of our official life and even the morale of the people.

The spiritual leader of Christendom was the patient Nazarene. He could forgive almost any form of transgression. About him he found everywhere human errors and yet he had no harsh words for human weakness. The one exception was the vice of hypocrisy, and, be it noted, the hypocrisy of the Scribes and Pharisees, the lawgivers of the Jewish commonwealth of that time. In all literature there is possibly no more biting invective than that which the patient and forgiving Nazarene uttered against the scribes of the law, as set forth in Chapter 23 of St. Matthew's Gospel:

> "Woe unto you, scribes and Pharisees, hypocrites! for ye pay tithe of mint and anise and cummin, and have omitted the weightier matters of the law, judgment, mercy and faith: these ought ye to have done, and not to leave the other undone.
>
> "Ye blind guides, which strain at a gnat and swallow a camel.
>
> "Woe unto you, scribes and Pharisees, hypocrites! for ye make clean the outside of the cup and of the platter, but within they are full of extortion and excess.
>
> "Thou blind Pharisee, cleanse first that

which is within the cup and platter, that the outside of them may be clean also."

I commend these verses to the distinguished bishop of Virginia, whose sincerity and high motives I do not question, that if in his militant efforts for prohibition he will only regain the spirit of the twenty-third chapter of St. Matthew he will moderate his activities and he will then become more like the bishops of the early Christian Church, of whom it can be said that they never provoked a political revolution and never tried to impose morality by state law. They never felt that was any part of the true functions of the Church. To "render unto Caesar the things that are Caesar's" and to the church its moral functions and activities was their ideal.

If the spirit of these verses makes no appeal to the distinguished prelate, then may I pass from sacred to profane literature and say to him, as Sir Toby said to Malvolio, "Dost thou think, because thou art virtuous, there shall be no more cakes and ale?"

We were told that prohibition would empty the jails and we have just voted millions to build more Federal prisons to accommodate the thousands who are being driven there by the law, many of whom might have been useful citizens. I refuse to believe that any system that indicts a thousand American citizens a week in our Federal courts, and in many cases destroys their self-respect, is of any real advantage to the development of American manhood.

The prohibition controversy presents an irrepressible problem, which has two grave aspects for the American people.

One is the relation of the nation to the States. The States had been losing their powers through the inevitable results of steam and electricity, but Federal prohibition so destroyed their moral consciousness as States that they are fast becoming little more than police provinces and their rights as states are rapidly vanishing. The "indissoluble union of indestructible states" has become little more than a rhetorical phrase. To those of us who loved the old Union, whose basic principle was local self government as to all matters that did not require a uniform rule of national regulation, it is tragical that, in less than one hundred and fifty years after the adoption of the Constitution, its very foundation, namely, Home Rule, has been thus undermined.

But, apart from the effect of prohibition upon our dual form of government, there is the greater and more ancient struggle between the man and the State. Our esteemed colleague from New Jersey, towards the close of his very eloquent remarks and after offering the wets the consolation that they could make their own wine and possibly beer in their own cellars, suggested to them that they "be content with what they make, but, above and beyond all, that they be good sports." Let me remind him that the English-speaking race have never taken tyrannical laws lying down. Their conception of sportsmanship is to continue to fight

until it is won. They believe, with Lincoln, that no question is ever settled until it is settled right, and they are no more afraid than Lincoln to be temporarily in a minority. They are not afraid of temporary defeat. Their spirit in this matter is an earnest one and has more to do with the human spirit than with physical appetite. To many—and I am one—the use of such beverages is a matter of indifference. It has never been a habit with me, although, when I leave the Statue of Liberty behind me in my Summer holiday, I occasionally enjoy a glass of wine or beer. The only appetite, of which I am conscious, is to restore the institutions of a once self-respecting people.

The direct way to end this system of tyranny and hypocrisy would be to repeal the Eighteenth Amendment and thus leave to the States the adjustment of the problem, in accordance with their local conditions and several necessities. The only function of the federal government should be to tax heavily all such beverages to discourage consumption and to utilize its power over interstate commerce to prevent the nullification of State laws by interstate shipments.

I appreciate the present and insuperable difficulty of securing such a repeal. The shadows of life are fast lengthening with me and I may never live to see the day when the Eighteenth Amendment is formally repealed. Fortunately, the American people are not so impotent that they cannot undo this gigantic folly without first securing the consent of three-fourths of the States. To make a formal addition to the Constitution, such consent is necessary, but the enforcement of any clause of the Constitution, which is not self-enforcing, depends upon the preponderating will of each living generation, for, as Jefferson well said, "The Constitution is for the living and not for the dead."

A clear distinction must be made between the clauses of the Constitution that in themselves are a mandate to Congress, on the one hand, and a mere delegation to Congress of power to do a thing. For example, the Constitution, by a specific mandate, required a census every ten years and the recent lamentable failure of Congress to comply with that imperative mandate admits of no excuse, for our duty was largely ministerial, but the Constitution also gives to Congress "the power" to regulate commerce. The method of regulation is a matter of political discretion, and if Congress is of opinion, as it was for the first century of the Republic, that the interests of commerce were best subserved by the absence of any Federal regulation, this would not constitute any violation of the Constitution. The Constitution gives to Congress the sole power to declare war but to maintain peace is not a violation of the Constitution. Congress has always had "the power" to levy an income tax but refused to do so until the Sixteenth Amendment made apportionment unnecessary.

In other words, the Constitution grants to Congress many powers, and states many objectives, but often leaves to the political discretion of Congress the question as to the manner of their exercise, or, indeed, whether they shall be exercised at all. Chief Justice Marshall well expressed this in *Gibbons* v. *Ogden*, when he said:

> "The wisdom and the discretion of Congress, their identity with the people, and the influence which their constituents possess at elections, are, in this, as in many other instances, as that, for example of declaring war, the sole restraints on which they have relied, to secure them from its abuse. They are the restraints on which the people must often rely solely, in all representative governments."

It must be conceded that the first section of the Eighteenth Amendment does contain a prohibition, which, however, is a mere *brutum fulmen* without enforcing statutes. But the second section shows that the Eighteenth Amendment is not self-enforcing, for it vests in Congress and the several States concurrent power "to enforce this article by appropriate legislation." The means, therefore, of enforcing this statute, or, indeed, the duty of enforcing it at all, rests in the political discretion of Congress and its members are only responsible to the American people. Therefore, while the Constitution is a "sacred compact be-

tween the dead, the living and the unborn," as Burke said, yet the living generation can determine whether such grants of power shall be exercised, and if so, in what manner. For a century, as stated, they were satisfied that the commerce power of the Constitution should not be exercised by affirmative legislation and similarly each living generation can determine for itself whether they will pass affirmative legislation to enforce the Eighteenth Amendment, or leave it without enforcing statutes.

Even if this were not so, Congress could, without any violation of the Constitution, reach the conclusion that the methods of enforcement and the actual enforcement of the Eighteenth Amendment were best left to the States, even as the States may without any violation of the Constitution leave all enforcing measures to the federal government.

I shall probably be stigmatized by thoughtless men, who have possibly never read the Constitution in years, with being a "nullificationist."

Such is not the fact. The discretion, which I claim for Congress, is vested in it by the Constitution itself. That great compact was formulated after our mother country had firmly established the supremacy of Parliament as the great Council of the Realm. Within the sphere of federal power the Fathers intended to make the Congress the great council of the Republic, with this difference that even within that sphere of federal power, the Constitution limited the powers thus delegated

by imperative "shalls" and "shall nots." Except as thus directed, the exercise of other "powers" were in the discretion of the Congress as the truest representative of the American people. This gives to the Constitution the "elasticity in detail," which Lord Bryce so much admired in his classic work. It makes the Constitution serve the living, as well as the dead.

Section 2 of the Eighteenth Amendment clearly lodged in the Congress of the United States and the legislatures of the several states "power" to enact enforcing legislation. It is significant that the Eighteenth Amendment did not say that they "shall" do so. It simply gives them the power.

Whenever a political discretion is lodged in Congress, the Constitution uses the expression "the Congress shall have power" and when no such discretion is vested in the Congress, the Constitution, with its characteristic precision, says Congress "shall" do a thing or Congress "shall not" do a thing. It thus wisely discriminated between matters which required an imperative mandate and matters which were left to the political discretion of Congress. The logical order of the Constitution clearly indicates this. The first seven sections of Article I, consist almost wholly of imperative "shalls" as to which Congress has no discretion whatever. As, for example, the mandate that Congress "shall" enumerate the people by a decennial census for the purpose of apportionment.

Then by section 9 there is provided a long series

of "shall nots," as to which Congress has no political discretion whatever. For example, the provision that no bill of attainder shall be passed, or any preference given to the port of one state over the port of another state, or that no title of nobility shall be granted by the United States. These imperative "shall nots" leave no political discretion to Congress whatever.

Section 10 then provides for a number of "shall nots" with respect to the states. As, for example, the statement that no state shall lay any impost or duty on imports or exports.

Having thus provided with an emphasis worthy of the Ten Commandments, what the Congress shall or shall not do, and what the states shall not do, section 8 of Article I is a lengthy statement of matters which are committed to the political discretion of Congress, and such grant of power is uniformly in the words, "the Congress shall have power," etc.

Undoubtedly the first section of the Eighteenth Amendment does operate to prevent any *affirmative* legislation, either by Congress or the states, which would legalize what that section expressly prohibits. If, for example, Congress or any State Legislature should pass a law to permit the sale of ardent liquors, the Supreme Court could declare such a statute void, but, if the Congress failed to pass any enforcing statute whatever, the prohibition of the first section is unenforceable in the federal courts.

In other words, Congress has a political discre-

tion as to whether it will pass enforcing statutes or not, but if it passes an enforcing statute, it must not contravene section 1 of the Eighteenth Amendment. In exercising this discretion, Congress has a right to define what an "intoxicating liquor" is and, within reasonable limits, the judiciary would accept such definition. In other words, the judiciary would not declare a beverage intoxicating which Congress refused to class as an intoxicating beverage, unless the fact of such intoxicating quality was clear beyond reasonable doubt.

When the American people thus recognize that the non-exercise of such a power is not necessarily a challenge to the Constitution, they will in due time wholly sweep away that monstrous compound of iniquity and folly, the Volstead Law, and upon its ruins build afresh. They will recognize that the normal use of light wines and beer not only does not lead to intoxication, but promotes temperance by preventing hard drinking and the use of narcotics. When that happy day comes, our colleague from Mississippi, who delighted us this morning with his discourse on ancient books, can add the Volstead Law to his valued incanabula of human folly.

However, it is not my purpose to discuss remedies, but to suggest that the living generation, without any violation of the Constitution, can mitigate the intolerable evils under which we are suffering. If we continue to submit to the graft, corruption and violence brought about by the Volstead Law, then it can be said of us, "The fault,

dear Brutus, is not in our stars, but in ourselves that we are underlings."

The American people often think slowly, but, in the long run, surely. They are too wise not to acknowledge a demonstrated error. Above all, they have not lost their love of individual liberty and their jealousy of governmental power and if they do not, in their own good time, end the "Witches' Sabbath" of moral demagoguery, hypocrisy and corruption, then I have much misjudged the character of the American people.

I have made no attempt to follow our distinguished colleague from New Jersey in his attempt to assay the relative economic advantages and disadvantages of prohibition. These are but the ponderables of the question. The great imponderable is the right of every man in a true democratic commonwealth to live his own life, always provided that he does not injure the equal right of others to pursue their own true and substantial happiness. In applying that basic principle of democracy to the problem of prohibition, we must not generalize from exceptional cases. A drunkard can be both a nuisance and a menace, but our past history and the history of civilization have shown that uncounted millions can enjoy the kindly juice of the grape without any injury, either to themselves or to others. Unless we are prepared to vindicate that primal liberty of a man to order his own life, we should tear down the Statue of Liberty in New York harbor, for at the moment and in this respect, it is little more than a brazen lie.

My colleagues of the House, I cannot conclude, as my time has expired, without assuring you how deeply I appreciate the consideration and patience with which those who differ with me have listened to my inadequate argument. To my mind the House of Representatives—and I do not say it to be ingratiating—is not only the most efficient parliamentary body in the world, regard being had to the unparalleled burdens that are cast upon it, but I think it has the noblest spirit. You would not find, I believe, in any other parliamentary body, in a moral issue in which there is such acute feeling as prohibition, that a speaker, representing but a fraction of the House, would have the patient, courteous attention, with which you all have honored me, even those to whom my argument is worse than "foolishness and a stumbling block."

Such tolerance is in this Chamber,—thank God for it,—and may it always be so, but it does not exist in equal measure outside of this Chamber. Since I announced five days ago my intention to make this speech on prohibition, I have had many letters, one of them threatening me in the most emphatic way, that if I dared to make this speech, I need not expect to return to Congress.

My fellow Members of Congress, when the time comes that in a great fundamental moral problem like this, I compromise my convictions to save my seat in Congress, may "my right hand forget her cunning and my tongue cleave to the roof of my mouth."

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TITLE